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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1971

No. 71-822

FRANK K. KING,

Appellant,

vs.

CITY OF SAN BERNARDINO, et al

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALIFORNIA

MOTION TO DISMISS

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Pursuant to Rule 16(1)(b) of the Rules of this Court, appellee moves that the appeal of the Appellant be dismissed on the following grounds:

1. The Federal question sought to be reviewed was not timely or properly raised or expressly passed upon by the Courts of California.

2. The judgment rests on an adequate non-Federal basis.

STATEMENT

On appeal to the Court of Appeal, Fourth Appellate District, of the State of California, no Federal questions were raised by Appellant. In fact, Appellant's Opening Brief (page 3) in that court stated the issues or questions to be as follows:

> "Statement of Issues
>
> 1. Does there exist a specific 'written' law, ordinance or resolution upon which Appellant may base his claim?
>
> 2. Assuming, *arguendo*, there is no specific 'written law,' ordinance or resolution upon which to base said claim do the facts and circumstances herein require the application of some principle of law or equity to afford Appellant relief?"

Appellant's Reply Brief filed in the Court of Appeal again (page 2) restated the issues in the identical language above stated, concluding that "Appellant's Statement of Issues is clear, i.e.:

> 1. Does there exist a specific 'written' law, ordinance or resolution upon which Appellant may base his claim?
>
> 2. Assuming, *arguendo*, there is no specific 'written' law, and/or resolution upon which to base said claim do the facts and circumstances herein require the application of some principle of law or equity to afford Appellant relief?"

The opinion of the Court of Appeal did not, therefore, discuss or pass upon any of the Federal constitutional questions now raised.

Subsequent to the decision of the Court of Appeal, the Appellant filed a Petition for Rehearing in the Court of Appeal, which was denied without opinion by said court. In that Petition for Rehearing, Appellant makes an allegation (pages 2-3) that he had made general averment in his Opening Brief that Labor Code Section 555 was unconstitutional.

On page 5, paragraph 2, of Appellant's Opening Brief, it was merely stated that:

> "Appellant contends there is no reasonable classifiction, or sense, in construing this limitation to that one city only. Cal. Const., Art. 1, Sections 11 and 21 and Article IV Section 25; *Hollman v. Warren*, 32 Cal. 2d 351; *Stout v. Demo. Cent. Comm.*, 40 Cal. 2d 91."

The reference hereinabove set forth was the only one made in the Court of Appeal in regard to a constitutional matter and no Federal issues were submitted to or decided by the Court of Appeal.

In his Complaint for Declaratory Relief Appellant made no allegation or averment that Labor Code Section 555 was unconstitutional. Appellant only alleged in Paragraph XII thereof that the resolution of the legislative body of the City of San Bernardino in its application to Appellant deprived him of due process of law and the equal protection of the law as set forth in the Constitutions of the State of California and of the United States.

Nowhere in the Complaint did Appellant refer to or cite Labor Code Section 555; nor did he allege that said State statute was unconstitutional under either the State or Federal Constitutions. In the prayer for judgment, Appellant merely asked for a judgment by way of declaratory relief that Appellant is entitled to compensatory time off or monetary remuneration in lieu thereof.

Appellant's Petition for Hearing in the California Supreme Court (page 2) raised, for the first time during the proceedings, the following constitutional question:

> "A. The arbitrary classification contained in California Labor Code §555 (restricting its application only to cities which are a 'city and county') is unconstitutional."

The allegation was made at page 3 that "such an interpretation is in violation of California CNTN (sic) Art. I, Secs. 11 and 21 and Art. IV, Sec. 25." It was contended at such late date that only a state constitutional question existed. No averment of a Federal constitutional question was made in the Appellant's Petition for Hearing in the California Supreme Court. The Petition was denied by the Supreme Court of California without opinion.

No opinion of the trial court, Court of Appeal or the Supreme Court of California discusses or passes upon any Federal Constitutional questions.

QUESTIONS PRESENTED

1. Where Federal constitutional questions are not properly raised by Appellant in proceedings seeking compensatory time off or monetary remuneration in lieu thereof, either in the State trial or appellate courts, and the opinions and orders of such Courts do not discuss or pass on any Federal questions, does the jurisdiction of the Supreme Court attach to an appeal from a state judgment denying the relief sought by Appellant?

2. Does the judgment of the Court of Appeal rest upon an adequate non-Federal basis?

ARGUMENT

1. THE APPEAL FAILS BECAUSE OF WANT OF JURISDICTION.

Prior to the filing of the Jurisdictional Statement in the Supreme Court of the United States, Appellant did not properly raise any Federal Constitutional questions. The validity of Labor Code Section 555 was, as hereinabove reviewed, never properly raised.

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the alleged Federal questions were raised in the state courts at the proper time and in the manner required by state law. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906); *Brown v. Commonwealth of Mass.*, 144 U.S. 573, 580, 12 S. Ct. 757, 759, 36 L. Ed. 546 (1892); *John v. Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1914).

The laws of the State of California require that constitutional questions be properly raised in the trial court and, if not, they will not be considered on appeal. *Sacramento and San Joaquin Drainage District v. Superior Court*, 196 Cal. 414, 422-423, 238 P. 687 (1925); 1 Cal. Pleading "Pleading Facts of a Legal Nature", Sec. 894. Furthermore, only errors on constitutional questions pointed out in the brief will be considered. An appellant who fails to present a point in his brief is precluded from insisting that the court consider the matter, and the court will not consider on a petition for rehearing questions not previously raised. 4 Cal. Jur. 2d, Appeal and Error, Sec. 480; *Epperson v. Rosemond*, 100 Cal. App. 2d 344, 223 P. 2d 655, 224 P. 2d 480 (rehearing denied) (1950).

2. THE JUDGMENT OF THE COURT OF APPEALS RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

The appellant, as alleged in his complaint, is a department head of the appellee and an unclassified member of its civil service. The Court of Appeal found that (Jurisdictional Statement, Appendix, p. 9) "appellant worked in a position of professional responsibility which required, not a specific number of hours of work, but instead, that his services accomplish a particular task at a fixed salary . . ."

The Court of Appeal held that the prevailing divisional law applicable to appellant as such a professional person was clear and certain. (Jurisdictional Statement, Appendix, p. 6).

> " 'It is established law in this state that in the absence of statutory provisions a public employe (sic) is not entitled to compensation for overtime worked.' (*Simpson v. Cranston*, 56 Cal. 2d 63, 65; *Adams v. City of Modesto*, 53 Cal. 2d 833, 835; *Jarvis v. Henderson*, 40 Cal. 2d 600, 606; *Martin v. Henderson*, 40 Cal. 2d 583, 589-590; *Welshans v. City of Santa Barbara*, 205 Cal. App. 2d 304, 308-309)."

Even if California Labor Code Section 555 was found to unconstitutionally limit the application of Section 550 to 554 to only officers and employees of the City and County of San Francisco, thereby depriving Appellant of the equal protection of the law, Appellant would still not prevail because there is no statutory or legislative authority to permit payment for overtime or compensatory time off.

Sections 510 to 556 of the California Labor Code merely define a "day's work" (§510), a "day's rest" (§550) and provide for one day's rest in seven (§551), maximum consecutive working days (§552), violation of the chapter (§553); exemptions (§554), applicability to cities and counties (§555), and exemption for a 30 hour week and a six hour day (§556). None of these sections authorize compensation for those hours worked in excess of the eight hour day. None of the Labor Code sections relied upon by the Appellant can be construed to be the "written law" which the decisional law of the State requires as a condition precedent to the receipt by a public employee of any compensatory rights or benefits other than his official salary (Jurisdictional Statement, Appendix, p. 6 for overtime work).

CONCLUSION

For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

RALPH H. PRINCE,
Attorney for Appellee.